Public Prosecutor v Low Hai Voon

HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NO 45–12 OF 2005
ZAMANI A RAHIM JC
25 AUGUST 2009

Criminal Procedure — Sentence — First offender — Young offender — Plea of guilty — Mitigation — Whether public interest demanded deterrent sentence — Whether child committing serious offence entitled to leniency

The child, who was 14 years and 9 months at the time of the commission of the crime, was originally charged with the offence of murder under s 302 of the Penal Code ('the Code') but after having proceeded to trial the charge was reduced to culpable homicide not amounting to murder under s 304(a) of the Code. The child pleaded guilty to the alternative reduced charge and his guilty plea was accepted by the court. In mitigation it was submitted that the child was a first offender, a non-smoker not involved in drug abuse and a school prefect. The child's probation officer submitted that the child was involved in beneficial activities such as the Bomba Sukarela Pengkalan Kundor, where he was a captain, and recommended that a lenient order be imposed on the child especially since he was a responsible child. It was also submitted that a sentence of imprisonment was inappropriate since the child rendered assistance to the deceased by taking him to the hospital for treatment and upon arrest gave co-operation to the police. However, the prosecution submitted that since the child had committed a serious offence the public interest demanded a deterrent sentence to be passed against him. The issue before the court in this case was to determine the suitable order to be given to the child having regard to the circumstances of this case.

Held, ordering the child to be sent to an approved school until he attains the age of 21 years:

(1) The relevant age to be considered was the child's age at the time of the commission of the crime. In the present case the child was 14 years of age (see para 18).

(2) Although the prosecution requested for a deterrent sentence, it had been stressed by case law that young offenders who are also first offenders ought to be sent to an advanced approved school rather than to prison. In the premises, in the interest of justice and the best interest of the child it was ordered that the child be sent to Henry Gurney School until he attained the age of 21 years (see paras 19 & 22).

A **[Bahasa Malaysia summary**

Seorang kanak-kanak, yang berumur 14 tahun dan 9 bulan semasa kesalahan tersebut dilakukan, pada asalnya dituduh dengan kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun') tetapi selepas bermula perbicaraan,
B pertuduhan telah dikurangkan kepada homisid salah yang tidak terjumlah kepada kesalahan membunuh di bawah s 304(a) Kanun. Kanak-kanak itu mengaku bersalah terhadap tuduhan alternatif yang lebih ringan tersebut dan akuannya telah diterima oleh mahkamah. Semasa mitigasi ia telah dinyatakan bahawa kanak-kanak tersebut merupakan pesalah pertama, seorang yang
C tidak merokok dan tidak terlibat dalam penyalahgunaan dadah dan seorang pengawas sekolah. Pegawai akhlak kepada kanak-kanak itu menyatakan bahawa kanak-kanak tersebut terlibat dalam kegiatan yang bermanfaat seperti Bomba Sukarela Pengkalan Kundor, di mana dia merupakan seorang kapten,
D dan mencadangkan satu perintah ringan dikenakan ke atas kanak-kanak tersebut memandangkan dia adalah seorang kanak-kanak yang bertanggungjawab. Ia juga dinyatakan bahawa hukuman penjara tidak sesuai kerana kanak-kanak tersebut memberikan bantuan kepada si mati dengan membawanya ke hospital untuk rawatan dan apabila ditangkap telah
E berkerjasama dengan polis. Bagaimanapun, pihak pendakwaan menghujah bahawa memandangkan kanak-kanak itu telah melakukan satu kesalahan serius kepentingan awam menuntut hukuman berat akan dikenakan terhadapnya. Isu di hadapan mahkamah bagi kes ini ialah untuk menentukan perintah sesuai harus dikenakan kepada kanak-kanak itu mengambil kira
F keadaan kes ini.

Diputuskan, memerintahkan kanak-kanak itu dihantar ke sekolah yang diluluskan sehingga dia mencapai umur 21 tahun:

G (1) Umur relevan yang akan dipertimbangkan ialah umur kanak-kanak pada masa kesalahan dilakukan. Dalam kes ini kanak-kanak itu berumur 14 tahun (lihat perenggan 18).

(2) Walaupun pendakwaan memohon untuk hukuman yang berat, ia telah
H ditegaskan dalam kes-kes bahawa pesalah-pesalah muda yang juga merupakan pesalah-pesalah pertama sepatutnya dihantar ke sekolah yang diluluskan dan bukan ke penjara. Oleh itu, atas kepentingan keadilan dan kepentingan terbaik untuk kanak-kanak tersebut ia diarahkan agar kanak-kanak itu dihantar ke Sekolah Henry Gurney
I sehingga dia dicapai umur 21 tahun (lihat perenggan 19 & 22).]

Notes

For cases on first offender, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3674–3680.

Cases referred to

Kesavan a/l Baskaran v PP [2008] 6 MLJ 384, CA (refd)
PP v Francis Kuin [2006] 6 CLJ 103, HC (refd)
PP v Kammoon Wannga & Anor [2009] 8 MLJ 430; [2009] 7 AMR 25, HC (refd)
PP v Saiful Afikin bin Mohd Firus [1996] 4 MLJ 309, HC (refd)
PP v Sharithan Pachemuthu [2000] 5 CLJ 15, HC (refd)
Tukiran bin Taib v PP [1955] MLJ 24 (folld)
Veerian T Letchmanen v PP [2001] MLJU 499; [2001] 7 CLJ 466, HC (refd)

Legislation referred to

Child Act 2001 s 91(1)(a), (b), (f)
Penal Code ss 302, 304, 304(a)

Allan Suman (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Rosli bin Ismail (Hoon & Rosli) for the child.

Zamani A Rahim JC:

[1] The child was originally charged with an offence of murder under s 302 of the Penal Code ('Code') and the charge read as follows:

Pertuduhan prinsipal pindaan

> Bahawa kamu bersama enam orang lain yang masih bebas pada 14.12.2004, jam lebih kurang 12.30 pagi di Gelanggang Bola Keranjang, Taman Berjaya, Jalan Pegawai, Persiaran Sultan Abdul Hamid, Alor Star, di dalam Daerah Kota Star, di dalam Negeri Kedah Darul Aman telah menyebabkan kematian Lean Hoo Cheong, No KP: 860228-02-5054, dengan niat bersama menyebabkan kematiannya, dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

[2] The principal amended charge was marked as P7.

[3] The child claimed trial to the charge. Having proceeded the trial with two witnesses, acting upon the child's representation, the charge was reduced to culpable homicide not amounting to murder under s 304(a) of the Code. The reduced alternative read as follows.

Pertuduhan pilihan

> Bahawa kamu bersama enam orang lain yang masih bebas pada 14.12.2004 jam lebih kurang 12.30 pagi di Gelanggang Bola Keranjang, Taman Berjaya, Jalan Pegawai, Persiaran Sultan Abdul Hamid, Alor Star, di dalam Daerah Kota Star,

di dalam Negeri Kedah Darul Aman telah menyebabkan kematian LEAN HOO CHEONG (No K/P: 860228–02–5054), dengan niat bersama menyebabkan kecederaan tubuh badan yang mungkin menyebabkan kematiannya, dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan yang dibaca bersama Seksyen 34 Kanun yang sama.

[4] The alternative charge was marked as P9. Both the charges, P7 and P9 were read and explained to the child in Mandarin. He understood both the charges, P7 and P9. He pleaded guilty to the alternative charge, P9 and understood the nature and consequences of his guilty plea.

[5] The statement of facts was presented by the learned deputy. Again the facts were explained to the child. The statement of facts were as follows.

Fakta kes

Pengadu dalam kes ini ialah Thang Wai Keong KP: 851002-02-5365.

Pada 14.12.2004 jam lebih kurang 12.30 pagi, semasa pengadu bersama Lean Hoe Cheong, nama panggilan Ah San (Simati) berada di rumah sewa Simati di No. 172, Taman Pelangi, Alor Star telah datang beberapa orang lelaki Cina termasuk Kanak-Kanak Low Hai Voon, nama panggilan Ah En @ Ah Voon yang merupakan bekas teman lelaki kepada teman wanita Simati bernama Joyce Ng Kin Ru meminta Pengadu bersama Simati dan teman wanita Simati serta seorang lagi kawan Simati ikut mereka ke gelanggang bola keranjang di Taman Berjaya, Alor Star.

Ketika berada di gelanggang bola keranjang tersebut, perbincangan untuk selesaikan masalah teman wanita di antara Kanak-Kanak dengan Simati telah dibuat. Joyce Ng Kin Ru telah ditanya oleh rakan Kanak-Kanak atau Simati tetapi Joyce Ng Kin Ru menjawab tidak tahu. Kemudian Simati telah diajak oleh rakan-rakan Kanak-Kanak ke tepi padang bola keranjang. Di situ Kanak-Kanak bersama rakannya telah bertindak memukul Simati dengan menggunakan tangan dan topi keledar. Simati tidak sedar diri dan dihantar ke Hospital Alor Star oleh rakan Kanak-Kanak dan Kanak-Kanak.

Simati telah dimasukkan ke Wad Kecemasan pada 14.12.2004 jam 1.38 pagi dan dihantar ke Wad H1 pada jam 1.50 pagi. Simati meninggal dunia pada 15.12.2004 jam 1.15 tengahari. Laporan bedah siasat Simati yang dijalankan oleh Dr Mohd Suhani bin Mohd Noor menunjukkan sebab kematian adalah 'head injury due to blunt trauma'.

Hasil siasatan yang dijalankan oleh ASP Ibrahim bin Mohamed Yusoff menunjukkan bahawa Kanak-Kanak bersama enam orang lain yang masih bebas telah melakukan kesalahan seperti dalam pertuduhan.

[6] The statement of facts was marked as P10. Thereafter, the learned deputy had tendered the post-mortem report on the deceased, Lean Hoo Cheong and it was marked as P11. The child admitted that the statement of the facts was correct. A

[7] Having satisfied that the child's plea was unequivocal I have accepted his plea of guilty and found him guilty under the alternative charge, P9 of culpable homicide not amounting to murder under s 304(a) of the Code. B

[8] At the time the offence was committed the child was 14 years and 9 months. He was born on 7 March 1990. The probation officer, SP3 was called to tender the 'probation report', P12. The 'probation report', P12 on the child may be summarised as follows. C

> At the time child was charged, he was a Form two student at Sekolah Menengah Kebangsaan Simpang Kuala, Alor Star. He was an average student with no disciplinary problems. He was active in the sports of basket ball and taekwando. He was also a prefect. D

[9] The child is a polite boy and respectful of elderly people. He is a non-smoker, a rare quality among the present younger generation. He is involved in a voluntary work — *Pasukan Bomba Sukarela*. From an ordinary member he is now holding the position of a captain with *Pasukan Bomba Sukarela Pengkalan Kundor*. E

[10] The child makes friend or socialises with his school mates only. In the evening he always play basket ball with his school friends. At night, he spends his time at home. His family is a closely knit family. F

[11] After work the child spends his time at Balai Bomba Sukarela Pengkalan Kundor. The family loves him very much as he is not a problem child. He is a responsible child. G

[12] The probation officer, SP3 recommended that the child be imposed a lenient order. When I interjected what she meant by a lenient order, she replied that the child be sent to approved school pursuant to s 91(1)(f) of the Child Act 2001. H

[13] In mitigation, learned counsel for the child advanced the following pleas. The child was a first offender who pleaded guilty upon reduction of the charge. He had no disciplinary problems at home and in school. He was not a smoker and naturally did not involve in drug abuse. He was a school prefect. He involved himself in beneficial activity — Bomba Sukarela Pengkalan Kundor where he was a captain, commanding 30 members under I

A him. He had demonstrated that he had leadership qualities. The child had regretted and apologised to the deceased family. He promised not to repeat the same mistake in future. At the time of the commission of the crime, he was of tender age of 14 years 9 months, immature and easily influenced by friends.

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[14] When the deceased dropped unconscious, the child rendered his assistance and took immediately the deceased to hospital for treatment. Upon arrest, the child gave full cooperation to the police. Learned counsel went on to submit that a sentence of imprisonment was inappropriate and unsuitable in the circumstances. Three authorities were submitted for the court consideration namely, *Public Prosecutor v Saiful Afikin bin Mohd Firus* [1996] 4 MLJ 309, *Public Prosecutor v Francis Kuin* [2006] 6 CLJ 103 and *Public Prosecutor v Sharithan Pachemuthu* [2000] 5 CLJ 15. Learned counsel prayed that the child be discharged upon his entering into a bond to be of good behaviour under s 91(1)(b) of the Child Act 2001.

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[15] On the other hand, learned deputy submitted that the public interest demand a deterrent sentence be passed as the child had committed culpable homicide which was a serious offence. The sentence passed must not only with the purpose to rehabilitate the child but to send reminder to the would be criminals who had similar propensities as the child that crime does not pay. In committing the crime, the weapons used were helmets to inflict the injuries on the deceased. Though the child pleaded guilty to the alternative charge under s 304(a) of the Code, he was not automatically entitled to a lenient sentence. Two authorities were advanced by learned deputy to support his submission namely, *Kesavan a/l Baskaran v Public Prosecutor* [2008] 6 MLJ 384 and *Veerian T Letchmanen v Public Prosecutor* [2001] MLJU 499; [2001] 7 CLJ 466. Learned deputy requested for a deterrent sentence be imposed.

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[16] The issue before this court is this — what is the most suitable order to be given to the child having regard to the surrounding and circumstances of this case.

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[17] The child was charged and found guilty with an offence of culpable homicide not amounting to murder under the first limb of s 304 of the Code, which carries a mandatory term of imprisonment which may extend to 20 years and also liable to fine. I have recognised in *Public Prosecutor v Kammoon Wannga & Anor* [2009] 8 MLJ 430 at p 449; [2009] 7 AMR 25 at p 40 that 'I have no doubt that the offence of culpable homicide not amounting to murder punishable under s 304(a) of the Penal Code is a serious offence. A precious life of Yusof Kolam, a young man of Thai nationality, aged 28 years had perished forever. His life is priceless and no amount of money may

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redeem or bring back his life from the grave. What is left is the grief and sorrow suffered by the family members of the deceased.'

[18] At the material time, the child was a young person, being above 14 years and under 18 years of age, and at the proceedings and order herein was made, he was 19 years 5 months and 3 days. In *Saiful Afikin bin Mohd Firus*, Nik Hashim JC (as he then was) said at p 314 as follows:

> For the purpose of this appeal, the relevant age to be considered by the court is the age when the child committed the offence and not the age at the time of the appeal.

[19] In deciding the appeal before him, His Lordship Nik Hashim JC, said that the law in *Tukiran bin Taib v Public Prosecutor* [1955] MLJ 24 is still good law, though decided over 50 years ago. What is the law? Bellamy J in *Tukiran bin Taib*, said:

> It has been stressed by this court that it is very desirable that young offenders, that is, offenders between the ages of 17 and 21 years, who are also first offenders, should be kept out the prison, if possible ... I consider that it would be more beneficial to the accused, and in the long run to the community at large, to send him to an advanced approved school rather than to prison.

[20] If 'deterrent sentence' requested for by learned deputy was to mean the child be sent to an imprisonment term in an ordinary prison, I would not accede to such a request having regard to the case of *Tukiran bin Taib*'s case.

[21] I am also the considered view, the child be discharged on a binding over upon entering into a bond to be of good behaviour under s 91(1)(a) of the Child Act 2001 as suggested by learned counsel was not suitable and commensurate with facts and surrounding circumstances of this case.

[22] In the premises, in the interest of justice and the best interest of the child, who was still young and full of vigorous energy, he be sent to approved school rather than to prison. I, therefore, ordered the child be sent to Henry Gurney School until he attains the age of 21 years under s 91(1)(f) of the Child Act 2001.

Child ordered to be sent to an approved school until he attains age of 21 years.

Reported by Kohila Nesan